directors. This is true even on shows with predominantly minority themes. For instance, a 1989 study by the National Commission on Working Women of 30 television shows featuring minority characters found that out of a total of 162 producers working on these shows, there was *one* Hispanic producer.[1]

With respect to screenwriters, a 1993 Writers' Guild of America (WGA) report on minority writers in Hollywood from 1987-1991 found that minorities still accounted for just 2.6% of those employed in feature films in 1991; minority writers accounted for 3.2% of employment in 1991 at the major studios. The report also showed that while minority writers' share of employment in television increased steadily from 2.9% in 1987 to 3.9% in 1990 and 1991, minority writers comprised just 5% of writers working in episodic television that season. Minority writers are most underrepresented in cable, where only one received writing credit.[2] While the 1993 WGA report combines all minorities into one category, there is no question that the situation for Hispanic writers, who were only 1% of WGA members in 1991, is much worse than that of minority screenwriters overall. An attorney representing Latino writers estimates that Latinos, one-third of the guild's minority writers, earn just one-third of 1% of the total earnings of such writers.[3]

The Directors Guild of America (DGA) released its 1994 report on Women and Minorities from 1983 to 1993 which "reveals a woeful record of employment for DGA women and minorities." The percentage of total days worked by minority directors in 1993 (4%) is lower than in 1983 (5%). Latinos are even more seriously underrepresented than are other minorities, according to the DGA report. While a mere 1.8% of DGA's members are Hispanic, only 42% of these members are actual directors. The rest are concentrated in less prestigious — and less well-paying — positions such as production associates, state managers, and associate directors.[4]

According to a 1993 report by the National Association of Hispanic Journalists (NAHJ), Hispanics are underrepresented within every occupational category and across the entire spectrum of the news industry. For example, the NAHJ report shows that Hispanics constituted 4% of total newspaper newsroom employees overall, including 2.4% of all newsroom managers, 3.6% of total copy editors, 4.8% of all reporters, and 6.9% of photographers and artists.[5] A 1992 study by the American Society of Newspaper Editors (ASNE) revealed even lower Latino newsroom employment — about 3% of employees overall.[6] Yet these dismal numbers represent substantial gains in recent years; according to ASNE, the number of Hispanic journalists increased by 67% between 1987 and 1992.

A 1993 University of Missouri study of minorities in television and radio reveals that while Latinos made up six percent of the total TV news force in 1992 — an increase of three percentage points or 100% — since 1976, there are only two Hispanic males and only three Hispanic females among television network correspondents. In radio, moreover, Hispanics represent only 3.3% of the total workforce, representing a scant one-half of one percentage point increase since 1976.[7]

The Missouri study also found that while 4.2% of television news directors are Hispanic, 76% of those news directors worked for independent stations, many of which are affiliated with the two Spanish-language television networks in the U.S.[8] These data strongly suggest that much of the growth in broadcast news staff found in the Missouri study — including correspondents and other on-screen figures — reflects hiring by the Spanish-language networks.

It is clear that Latinos are severely underrepresented in every sector of the entertainment and broadcast media. Moreover, Hispanics within the media are particularly unlikely to hold managerial, supervisory, or other positions of power.

C. Absence of Vigorous Oversight

There are relatively few truly independent institutions — inside or outside the government — that oversee and report on media practices on a consistent basis. The most frequent commentators on media coverage are themselves members of the media, including media critics (both entertainment and news), reporters and editors who frequently appear on television and radio talk shows to discuss media coverage, and the few "ombudsman" offices established by some major newspapers.

Anecdotal evidence shows that Latino commentators and Hispanic themes are as rare in this key sector of the news and entertainment industry as they are in regular programming. For example, a June 1994 *Chicago Tribune* article noted that out of the more than 500 film critics in the U.S., fewer than 10 are Black, Hispanic, or Asian.[9] Similarly, a search of *Washington Post* columns over two years by the newspaper's ombudsman revealed not a single article addressing coverage of the Latino community. Furthermore, an informal search of recent, critically acclaimed books covering the histories and role of the media revealed almost no references to Latinos at all, and most of those that did appear were cursory at best.[10]

Moreover, there has been little interest in Latinos and Latino concerns from self-styled mainstream media "watchdog" groups. With one exception notable for its rarity, neither the conservative Accuracy in Media (AIM) nor the left-leaning Fairness and Accuracy in Reporting (FAIR) appear to have addressed media coverage of Hispanics.[11]

At least two major Hispanic-focused watchdog efforts have played important roles in monitoring the media. The first is the California-based National Hispanic Media Coalition, which specializes in challenging radio and television station license renewals in administrative proceedings before the Federal Communications Commission (FCC). The Coalition has become increasingly active in this area in recent years, and in partnership with other minority organizations has filed more than 200 such challenges since 1990.[12] In addition, the National Association of Hispanic Journalists, in cooperation with other Latino organizations, has for five years issued reports on the number of Hispanic journalists in the nation's 100 largest circulation daily newspapers; in its 1993 report, *No Room at the Top*, the Association also included a survey of Hispanics in broadcast news and addressed a series of other issues.[13] Yet both of these efforts focus principally on employment, and neither organization researches the content of entertainment programming and news coverage on a consistent basis.

Government bodies with jurisdiction over the media have been similarly unwilling to review the status of media coverage of Latinos. Perhaps the most logical candidate within the federal government to undertake a vigorous "watchdog" role — the U.S. Commission on Civil Rights — has updated its landmark 1977 study, *Window Dressing on the Set* only once, in 1979. After an effort by Latino advocates in 1990 to encourage the Commission to renew its historic focus on the media, and to emphasize portrayals of Latinos, the Commission held a single hearing in 1993. Since that time, no major study or project on minorities and the media has been announced by the Commission and prospects for future Commission action are unclear.[14]

The FCC, principally through its authority to review and approve licensing of local radio and television stations, has an important regulatory function in monitoring the equal employment opportunity compliance of its licensees.[15] Although actual license revocations on equal opportunity grounds are extremely rare, the Commission does have the authority to impose fines of up to $250,000. Since 1988, it is estimated that the FCC has fined about 20 stations and imposed license conditions on several dozen others;

apparently, few of these have involved Latinos. Moreover, the FCC's own guidelines use a "50% of labor force parity" standard in assessing equal opportunity efforts of licensees, and frequently relies on outdated demographic data in its determinations of compliance.[16]

Through its power to enforce Title VII of the Civil Rights Act of 1964 and other equal employment opportunity statutes, the Equal Employment Opportunity Commission (EEOC) also has jurisdiction over the hiring and promotion practices of much of the broadcast industry. However, it does not appear that the Commission has yet exercised its authority to systematically investigate the impact of employment practices in the broadcast industry on Hispanics. In addition, the EEOC historically has an extremely poor record of addressing Latino concerns.[17]

The Congress also has considerable power in this area which it has recently exercised both through its oversight authority and through legislation, such as the Children's Television Act of 1990. In addition, a number of Congressional Committees have aggressively pursued the impact of violence in the media through high profile oversight hearings and proposed legislation. Despite substantial Congressional interest in portrayals of minorities and women overall, however, there does not appear to have been even a single hearing in recent years focusing exclusively or primarily on the media's treatment of the Hispanic community.

Hispanics are thus rarely among those who make the decisions about or evaluate what Americans see, hear, and read in the media. Those who are in such positions do not appear to include Latino perspectives on a sustained, consistent basis. Given the scope of the problem as documented in Chapter I of this report and the considerations discussed above, it is clear that addressing this issue will require considerable effort. Nevertheless, NCLR believes this effort will be necessary given the serious consequences of failing to address the situation, as documented in Chapter II of this report. Recommendations to guide such an effort are discussed in the following chapter.

Endnotes

1. National Commission on Working Women, *Black, Hispanic, and Asian Characters on Entertainment TV*. Washington, D.C.: National Commission on Working Women, 1989.

2. Bielby, William T. and Denise Bielby, *The 1993 Hollywood Writers' Report*. West Hollywood, CA: Writers Guild of America, 1993.

3. Letter regarding the Writers' Guild Report from David Dantes, attorney for the Latino Writers Group.

4. Directors Guild of America, *DGA Report on Women and Minorities*. Los Angeles: Directors Guild of America, Inc., 1994.

5. Arocha, Zita and Roberto Moreno, *Hispanics in the News Media, 1993: No Room at the Top*. Washington, D.C.: National Association of Hispanic Journalists, National Council of La Raza, and Hispanic News Media Association of Washington, D.C., 1993.

6. As reported in *Hispanics in the News Media, 1993, op. cit.*

7. Stone, Vernon, "1993 University of Missouri Study of Minorities in Television and Radio," in *Hispanics in the News Media 1993: No Room at the Top, op. cit.*

8. *Ibid.*

9. Lovell, Glenn, "A Narrow Spectrum," *Chicago Tribune*, June 26, 1994.

10. These searches were conducted by NCLR based on materials available in NCLR files. While hardly definitive, they are at least illustrative of the point. For example, among the recent books on the media reviewed by NCLR was Howard Kurtz, *Media Circus*. New York, NY: Random House, 1993. This widely acclaimed book by the *Washington Post*'s respected press critic, which exposes media "bungling" of a variety of stories including several which explicitly address issues of race and ethnicity, does not include a single anecdote focusing on media coverage of Hispanics, although it includes several passing references to individuals who are Latino.

11. Cited in Fairness & Accuracy in Reporting Press Release, "FAIR Raises Questions about Source in Immigration Debate," July 27, 1993.

12. See "Bias Challenges Against Stations' Licenses Soaring," *Los Angeles Times*, July 7, 1990. See also, "NMHC Seeks to Block Radio Licenses," *California La Raza Newsletter*, December 1990.

13. *Hispanics in the News Media, 1993, op. cit.*

14. See, for example, Senate Report 101-515, Committee on Appropriations, October 10, 1990, which stated in pertinent part:

> ...the Committee encourages the Commission to consider a follow-up of the 1977 study, "Window Dressing on the Set," to focus on the fair representation and treatment of minorities in the media, with an emphasis on Hispanics and women.

See also, the Commission's proposed "Project Concept" dated February 6, 1991, which proposed an extensive study, modified by Commission memoranda dated May 15, 1992, and May 20, 1992, proposing a far more limited effort (available on file at NCLR).

15. Although the Commission has expressed some concern about the issue of on-screen underrepresentation and negative portrayals of minorities, it has relatively little direct authority to regulate the content of programming.

16. See FCC rule 73.2080, which calls on licensees to refrain from employment discrimination and to carry out positive and continuing efforts to recruit, employ, and promote qualified women and minorities. See also, "Bias Challenges Against Station Licenses Soaring," *op.cit.*

17. See *The Empty Promise*, *op. cit.*

IV. Recommendations

With respect to both the entertainment and news media, Americans of Hispanic descent are truly "out of the picture." Assuring accurate, sensitive, and proportional entertainment portrayals and news coverage will require a multi-faceted, comprehensive, and long-term program involving the government, the industry, and the Hispanic community.

In recognition of the magnitude of the task of reforming an industry that is both ubiquitous and diverse, the recommendations listed herein are intended to be illustrative, rather than comprehensive. Specific recommendations, by sector, are listed below.

A. Government

1. ***Congress***: The Congress should exercise both its oversight and legislative authority to address the issues raised in this report; specifically, NCLR recommends that:

   - **Congress help call public attention to the problem**, by holding hearings to address the underrepresentation of Latinos in the media, negative and stereotypical media portrayals of Hispanics, and the industry's efforts to improve Latino employment.

   - **Congress consider additional legislation to address the problem**. Protective legislation, such as the Children's Television Act of 1990, or remedial legislation analogous to the Community Reinvestment Act (CRA) which governs the nation's financial institutions, should be explored, particularly with respect to the broadcast media.

2. ***Federal Communications Commission (FCC)***: As the federal government's telecommunications enforcement arm, the FCC has primary jurisdiction on matters related to minorities in the media, authority which it has not vigorously exercised on behalf of the Hispanic community. NCLR believes that the FCC should begin to exercise such authority immediately; specifically, NCLR recommends that:

   - **The FCC revise and strengthen its regulatory standards.** In particular, the Commission should use a "100% of parity" standard to measure equal employment opportunity compliance, rather than the current "50% of parity" guideline; to do otherwise is tantamount to a Commission endorsement of employment policies and practices that lead to underrepresentation of Hispanics and other minorities. In addition, the Commission should use updated demographic data from the Census and other sources to hold licensees to the highest possible standard; this is especially important given rapid Hispanic population growth.

   - **The FCC impose severe fines and other penalties on licensees found to have violated equal opportunity guidelines.** The Commission should use the authority granted in 1990 to impose fines of up to $250,000 where warranted. Chronic violators, or those with particularly egregious records, should have their licenses revoked.

3. ***Other Federal Agencies***: A number of other federal or quasi-federal agencies have the capacity to address the problem through vigorous oversight, enforcement, or support of

positive programming efforts. Each function is important, and all must be pursued; specifically, NCLR recommends that:

- **The U.S. Commission on Civil Rights conduct a comprehensive study of media portrayals of minorities and women**, with a special focus on Hispanics and other previously neglected groups, consistent with previous Congressional recommendations.

- **The Equal Employment Opportunity Commission place a high priority on the media**. Among the activities the EEOC should carry out are hearings on Hispanic employment in the entertainment and news industry. The EEOC should also consider affirmative "pattern and practice" investigations of, and where appropriate, litigation against media entities under its jurisdiction.

- **The Corporation for Public Broadcasting aggressively seek out, produce, and promote high-quality Hispanic programming**. As a quasi-federal agency which receives public funding, the Corporation for Public Broadcasting (CPB) has a special obligation to provide programming which fairly and accurately portrays all groups in American society. Programs on public television such as the landmark documentary series, *Eyes on the Prize*, have had a significant positive effect on public understanding of the experiences of African Americans; similar Latino-focused programming should be supported.

- **The National Endowment for the Arts and the National Endowment for the Humanities increase support for media-oriented Hispanic-focused projects**. Hispanic Americans contribute to the artistic and cultural projects supported by these agencies — many of which eventually become documentaries and feature films — through their tax dollars; however, with a few notable exceptions, such as *The Ballad of Gregorio Cortez*, these agencies rarely invest proportionately in Latino-focused projects. These agencies should increase their support for such projects through enhanced outreach efforts, special competitions, and similar affirmative efforts.

- **The federal government increase the proportion of scientific research funding allocated to Hispanic-oriented media research**. Much of the research cited in this report was supported by various federal agencies including the National Institute of Mental Health, the Office of the Surgeon General, and the Administration of Aging at the Department of Health and Human Services; the National Academy of Sciences; and other research institutions. However, few of these federally-funded studies focused principally, much less exclusively, on Hispanics; this must change. NCLR recommends that such federally-supported, media-related research be required to include Hispanic samples and emphases consistent with the growing proportion of the population that is Latino.

B. News and Entertainment Industry

Changing the situation of Hispanics in the media will require commitment and leadership at all levels — and within each sector — of the vast media industry. NCLR believes that all sectors of the industry should immediately accept two broad sets of principles governing news and programming content and employment. In addition, NCLR recommends certain industry-specific actions, as described below.

1. ***Content Standards***: NCLR believes that clearly articulated, voluntary standards and codes of ethics are one means of promoting increased and more sensitive portrayals of Latinos, consistent with the need for artistic freedom and the protections of the First Amendment. NCLR believes that guidelines set forth by UCLA Professor Gordon Berry governing portrayals of ethnic and racial groups provide a solid basis from which industry officials can work (see box). Specifically, NCLR recommends that:

   - **All sectors of the news and entertainment industry voluntarily adopt — and widely disseminate — a set of principles or code of ethics that commits the industry to promoting equitable, accurate, and sensitive portrayals of Latinos and other minorities.** These principles, which could be based on the Berry Guidelines or other similar standards, should not only be disseminated to media "watchdog" organizations, civil rights organizations, and community

Berry Guidelines for Ethnic Group [Gender] Portrayals

1. Program content portrays various ethnic groups [both males and females] evenly in society, including depictions of historical, cultural, and current events
2. Program content portrays various ethnic groups [both genders] evenly in their contributions to the arts and sciences.
3. Program content shows a diversity of professional and vocational roles and careers among various ethnic groups [each gender].
4. Program content does not define or limit occupational aspirations in terms of ethnicity [gender].
5. Program content portrays various ethnic groups [both genders] throughout the range of socioeconomic conditions and life-style situations.
6. Program content portrays both traditional and nontraditional activities performed by characters, regardless of ethnicity [gender].
7. Program content portrays active, creative, and problem-solving roles proportionally among various ethnic groups [males and females].
8. Program content uses dialogue between various characters that is free of stereotypical language, demeaning labels, and/or race-related [gender-related] retorts.
9. Program content portrays emotional reactions such as fear, anger, aggression, excitement, love, and concern regardless of ethnicity [gender].
10. Program content does not stereotype personality traits based on ethnicity [gender].

groups, they should be incorporated into annual performance standards and reviews that such entities conduct in the normal course of business.

2. ***Increased Latino Employment***: The news and entertainment industries should also take other proactive steps to help remedy the underrepresentation of Hispanics in the industry — particularly in decision-making positions — which NCLR has identified as a major cause of unacceptable Hispanic media portrayals. Specifically, NCLR recommends that:

   - **The industry adopt clear plans and strategies for hiring and promoting Latinos and other minorities.** Each segment of the media should immediately prepare and adopt specific plans and strategies to assure parity in Hispanic employment within a reasonable period, perhaps under the auspices of some of the media's major trade associations such as the National Association of Broadcasters, the Motion Picture Association of America, the National Cable Television Association, or the Association of Newspaper Publishers. These plans should provide for Latino-specific hiring and promotion goals for all occupational categories, and should include specified milestones and timelines. As a show of good faith, broadcasters covered by FCC rules should voluntarily adopt the "100% of parity" employment standard discussed above in the development of their plans and strategies.

   - **Industry trade associations increase cooperative efforts with Latino and/or minority caucuses of the various labor guilds and professional associations.** The management side of the entertainment industry should use the expertise and resources of the various minority caucuses of the Guilds in the entertainment field. As demonstrated by the frequency with which their reports are cited herein, these groups, including the Screen Actors Guild, the Directors Guild of America, and the National Association of Hispanic Journalists, have made this issue a priority for many years. For too long, these groups' fine work has gone unheralded and their recommendations unheeded; this situation must change.

   - **Diversity clauses in standard collective bargaining agreements be enforced more vigorously.** In all collective bargaining agreements signed by production companies or advertisers with the Screen Actors Guild (SAG), for example, the company agrees to "realistically portray the American scene" in its full diversity, and "to provide all qualified performers with equal access to auditions and casting." As part of that contractual agreement, the production company voluntarily provides SAG with data on the age, ethnicity, and gender of performers hired. While these data are helpful in identifying problems, the violations of the diversity clauses themselves are rarely acted on. All reasonable legal steps should be taken to impose civil penalties and other sanctions against violators of these diversity clauses.

3. ***The Entertainment Industry***: In addition to minimizing negative portrayals through content standards, affirmative steps should be taken to produce special Latino-focused programming. Recent critically and commercially successful films such as *Stand and Deliver, Like Water for Chocolate*, and *La Bamba* unequivocally demonstrate that such programming appeals to broad audiences. Specifically, NCLR recommends that:

   - **Production studios and independent producers aggressively seek out promising Latino-focused programming material**. Much of this material can be found in traditional Hispanic folklore (*Like Water for Chocolate*), contemporary fiction (*Milagro Beanfield War*), both historical and contemporary biographies of noted Hispanics (*Ballad of Gregorio Cortez, Stand and Deliver*), and among today's headlines (*El Norte*).

   - **The industry provide increased support for education and training programs for promising Hispanic actors, producers, writers, and directors**. A key void for the Latino community in the entertainment industry is a dearth of persons in decision-making positions who have the ability to "green-light" projects. In order to expand the pool of Hispanic "players," NCLR urges the development of and support for film school scholarship programs, entry-level career-track development efforts, and on-the-job training programs.

   - **The industry provide increased support for Hispanic independent and community-based entertainment projects**. Much of the entertainment industry's most innovative and creative efforts, especially from women and African Americans, originated with the independent and community-level arts and entertainment communities. NCLR encourages the industry to support similar Latino community-based efforts, including theaters and production companies, to help develop and nurture creative talent. In addition, the major film festivals should seek out more minority entrants, especially from Latinos and other underrepresented groups.

4. ***The News Industry:*** There are a number of proactive steps that the news industry can take in order to improve accuracy in covering issues affecting or involving Hispanics. NCLR recommends that:

   - **Each segment of the news industry conduct a periodic self-assessment of its coverage of the Hispanic community**. Such self-assessments should include commissioning content analyses of its news coverage by independent organizations or scholars, organizing community forums and symposia to obtain input from the Latino community, and determining the extent to which Hispanic perspectives are included in stories on "non-Hispanic" themes, i.e., the economy, business, and the arts.

   - **The news industry develop more effective internal mechanisms for monitoring the comprehensiveness and accuracy of its news coverage**. In addition to increased employment and more effective retention and promotion of

Latino journalists, the news media should take steps to assess and correct its own performance. Actions as simple as retaining and disseminating to all editors and reporters lists of trustworthy Latino sources or technical experts on Hispanic issues would greatly improve most media coverage. Making an affirmative effort to include Hispanic views on "mainstream" stories, as well as investing resources in special series and features on Hispanic themes, would substantially improve the "inclusiveness" of news coverage. In addition, the industry should institutionalize self-assessments, and make these evaluations public. Finally, newspapers and network news organizations could hire or retain distinguished Hispanic scholars, perhaps on a rotating basis, to fill a special "ombudsman" role to monitor and comment on the organization's coverage of Latino issues.

C. The Hispanic Community

The Hispanic community must play a more aggressive and effective role in promoting increased, non-stereotypical Latino portrayals in the entertainment media, and more complete and accurate coverage of Hispanics by the news media. As noted in the foreword to this report, NCLR intends to launch a major new media initiative. Initially, this initiative will include two broad elements:

- **Stimulating or Conducting New Research**: Major gaps remain in the existing research literature on Hispanics and the media; NCLR intends to fill some of these gaps. Among the areas in need of further research are content analyses of portrayals of Hispanics in feature films, in broadcast and print news coverage, advertising, and public radio and television. In addition, there is an enormous need for further studies which directly measure the effects of media portrayals on public opinion and on Hispanic self perceptions.

- **Conducting Aggressive Media Advocacy**: Major reform rarely occurs in a vacuum, or simply because a problem has been identified. Assuring broad public awareness of the problem, promoting effective responses, and monitoring the implementation of solutions are essential elements of any long-term reform effort; NCLR intends to be an active participant in this effort. NCLR's media advocacy activities will include: promoting the prompt and effective implementation of the recommendations included in this report, particularly those which relate to the federal government; encouraging responsible corporations to limit their advertising support only to those programs and entities which assure equitable and accurate Hispanic portrayals; supporting and facilitating the work of existing Latino media organizations and associations; creating new forums and vehicles for recognizing both positive and negative media portrayals of Latinos; and directly monitoring and calling public attention to egregious entertainment portrayals and news coverage of Hispanics.

In addition to those efforts carried out by NCLR and other national Hispanic organizations, a number of other entities within the Hispanic community have important roles to play in addressing the media's treatment of the Hispanic community; specifically, NCLR recommends that:

- **Local community organizations and other Hispanic leaders expand their advocacy**

agendas to include a media focus. Local Latino leaders have both the responsibility and the unique ability to significantly influence local media portrayals and coverage of Hispanics. Not only should they identify and call attention to negative portrayals, they should make an affirmative effort to support those elements of the media — including the Spanish-language media — which cover Latinos and Latino issues in a responsible manner.

- **Hispanic-owned businesses and Latino elected and appointed officials use their influence to promote more accurate and sensitive media portrayals of Latinos.** Hispanic-owned firms, and their non-Latino vendors and customers, can exercise considerable clout with the media through their advertising budgets; they should use this influence aggressively. Similarly, Latino government officials should use their growing power to promote more accurate Hispanic media portrayals, as their African American counterparts have done so effectively in other contexts, e.g., South Africa.

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Vasquez and Company
Los Angeles, CA

LEGAL COUNSEL

Christopher Lipsett, Esq.
Wilmer, Cutler and Pickering
Washington, D.C.

EXHIBIT H

U. S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

June 28, 1995

MEMORANDUM TO GENERAL COUNSELS

From: Walter Dellinger
Assistant Attorney General

Re: Adarand

This memorandum sets forth preliminary legal guidance on the implications of the Supreme Court's recent decision in Adarand Constructors, Inc. v. Peña, 63 U.S.L.W. 4523 (U.S. June 12, 1995), which held that federal affirmative action programs that use racial and ethnic criteria as a basis for decisionmaking are subject to strict judicial scrutiny. The memorandum is not intended to serve as a definitive statement of what Adarand means for any particular affirmative action program. Nor does it consider the prudential and policy questions relevant to responding to Adarand. Rather, it is intended to provide a general overview of the Court's decision and the new standard for assessing the constitutionality of federal affirmative action programs.

Our conclusions can be briefly summarized. Adarand made applicable to federal affirmative action programs the same standard of review, strict scrutiny, that City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), applied to state and local affirmative action measures -- with the important caveat that, in this area, Congress may be entitled to greater deference than state and local governments. Although Adarand itself involved contracting, its holding is not confined to that context; rather, it is clear that strict scrutiny will now be applied by the courts in reviewing the federal government's use of race-based criteria in health, education, hiring, and other programs as well.

The Supreme Court in Adarand was careful to dispel any suggestion that it was implicitly holding unconstitutional all federal affirmative action measures employing racial or ethnic classifications. A majority of the Justices rejected the proposition that "strict scrutiny" of affirmative action measures means "strict in theory, fatal in fact," and agreed that "the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country" may justify the use of race-based remedial measures in certain circumstances. 63 U.S.L.W. at 4533. See id. at 4542 (Souter, J., dissenting); id. at 4543 (Ginsburg, J., dissenting). Only two Justices advocated positions that approach a complete ban on affirmative action.

The Court's decision leaves many questions open -- including the constitutionality of the very program at issue in the case. The Court did not discuss in detail the two requirements of strict scrutiny: the governmental interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest. As a consequence, our analysis of Adarand's effects on federal action must be based on Croson and the lower court decisions applying strict scrutiny to state and local programs. It is unclear, however, what differences will emerge in the application of strict scrutiny to affirmative action by the national government; in particular, the Court expressly left open the question of what deference the judiciary should give to determinations by Congress that affirmative action is necessary to remedy discrimination against racial and ethnic minority groups. Unlike state and local governments, Congress may be able to rely on national findings of discrimination to justify remedial racial and ethnic classifications; it may not have to base such measures on evidence of discrimination in every geographic locale or sector of the economy that is affected. On the other hand, as with state and local governments under Croson, Congress may not predicate race-based remedial measures on generalized, historical societal discrimination.

Two additional questions merit mention at the outset. First, the Court has not resolved whether a governmental institution must have sufficient evidence of discrimination to establish a compelling interest in engaging in race-based remedial action before it takes such action. A number of courts of appeals have considered this question in reviewing state and local affirmative action plans after Croson, and all have concluded that governments may rely on "post-enactment" evidence -- that is, evidence that the government did not consider when adopting the measure, but that reflects evidence of discrimination providing support for the government's determination that remedial action was warranted at the time of adoption. Those courts have said that the government must have had some evidence of discrimination when instituting an affirmative action measure, but that it need not marshal all the supporting evidence at that time. Second, while Adarand makes clear that remedying past discrimination will in some circumstances constitute a compelling interest sufficient to justify race-based measures, the Court did not address the constitutionality of programs aimed at advancing nonremedial objectives -- such as promoting diversity and inclusion. For example, under Justice Powell's controlling opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), increasing the racial and ethnic diversity of the student body at a university constitutes a compelling interest, because it enriches the academic experience on campus. Under strict scrutiny, it is uncertain whether and in what settings diversity is a permissible goal of affirmative action beyond the higher education context. To the extent that affirmative action is used to foster racial and ethnic diversity, the government must seek some further objective beyond the achievement of diversity itself.

Our discussion in this memorandum proceeds in four steps. In Section I, we analyze the facts and holding of Adarand itself, the scope of what the Court did decide, and the questions it left unanswered. Section II addresses the strict scrutiny standards as applied to state and local programs in Croson and subsequent lower court decisions; we consider the details of both the compelling interest and the narrow tailoring requirements Croson

mandated. In Section III, we turn to the difficult question of how precisely the Croson standards should apply to federal programs, with a focus on the degree of deference courts may give to congressional determinations that affirmative action is warranted. Finally, in an appendix, we sketch out a series of questions that should be considered in analyzing the validity under Adarand of federal affirmative action programs that employ race or ethnicity as a criterion. The appendix is intended to guide agencies as they begin that process.

I. The Adarand Case

A. Facts

Adarand involved a constitutional challenge to a Department of Transportation ("DOT") program that compensates persons who receive prime government contracts if they hire subcontractors certified as small businesses controlled by "socially and economically disadvantaged" individuals. The legislation on which the DOT program is based, the Small Business Act, establishes a government-wide goal for participation of such concerns at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. § 644(g)(1). The Act further provides that members of designated racial and ethnic minority groups are presumed to be socially disadvantaged. Id. § 637(a)(5), § 637(d)(2),(3); 13 C.F.R. § 124.105(b)(1).[1] The presumption is rebuttable. 13 C.F.R. §§ 124.111(c)-(d), 124.601-124.609.[2]

In Adarand, a nonminority firm submitted the low bid on a DOT subcontract. However, the prime contractor awarded the subcontract to a minority-owned firm that was presumed to be socially disadvantaged; thus, the prime contractor received additional compensation from DOT. 63 U.S.L.W. at 4525. The nonminority firm sued DOT, arguing that it was denied the subcontract because of a racial classification, in violation of the equal protection component of the Fifth Amendment's Due Process Clause. The district court granted summary judgment for DOT. The Court of Appeals for the Tenth Circuit affirmed, holding that DOT's race-based action satisfied the requirements of "intermediate scrutiny," which it determined was the applicable standard of review under the Supreme Court's rulings

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[1] The following groups are entitled to the presumption: African American; Hispanic; Asian Pacific; Subcontinent Asian; and Native American. See Adarand, 63 U.S.L.W. at 4524. This list of eligible groups parallels that of many federal affirmative action programs.

[2] DOT also uses the subcontractor compensation mechanism in implementing the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 145, and its successor, the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-22. Both laws provide that "not less than 10 percent" of funds appropriated thereunder "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." STURAA and ISTEA adopt the Small Business Act's definition of "socially and economically disadvantaged individual," including the applicable race-based presumptions. Adarand, 63 U.S.L.W. at 4525.

in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), and Fullilove v. Klutznick, 448 U.S. 448 (1980). See Adarand, 63 U.S.L.W. at 4525.

B. The Holding

By a five-four vote, in an opinion written by Justice O'Connor, the Supreme Court held in Adarand that strict scrutiny is now the standard of constitutional review for federal affirmative action programs that use racial or ethnic classifications as the basis for decisionmaking. The Court made clear that this standard applies to programs that are mandated by Congress, as well as those undertaken by government agencies on their own accord. 63 U.S.L.W. at 4530. The Court overruled Metro Broadcasting to the extent that it had prescribed a more lenient standard of review for federal affirmative action measures. Id.[3]

Under strict scrutiny, a racial or ethnic classification must serve a "compelling interest" and must be "narrowly tailored" to serve that interest. Id.[4] This is the same standard of review that, under the Supreme Court's decision in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), applies to affirmative action measures adopted by state and local governments. It is also the same standard of review that applies to government classifications that facially discriminate against minorities. 63 U.S.L.W. at 4529, 4531.

In a portion of her opinion joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas, Justice O'Connor sought to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'" when it comes to affirmative action. Id. at 4533 (quoting Fullilove, 448 U.S. at 519 (Marshall, J., concurring in the judgment)). While that familiar maxim doubtless remains true with respect to classifications that, on their face, single out racial and ethnic minorities for invidious treatment,[5] Justice O'Connor's opinion declared that the federal government may have a compelling interest to act on the basis of race to overcome the "persistence of both the practice and lingering effects of racial discrimination against minority groups in this country." Id. In this respect, Justice O'Connor's opinion in Adarand tracks her majority opinion in Croson. There, too, the Court declined to interpret

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[3] Justice O'Connor (along with three other Justices) had dissented in Metro Broadcasting and urged the adoption of strict scrutiny as the standard of review for federal affirmative action measures.

[4] A classification reviewed under intermediate scrutiny need only (i) serve an "important" governmental interest and (ii) be "substantially related" to the achievement of that objective. Metro Broadcasting, 497 U.S. at 564-65.

[5] See, e.g., McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (racial and ethnic classifications that single out minorities for disfavored treatment are in almost all circumstances "irrelevant to any constitutionally acceptable legislative purpose") (internal quotations omitted); Loving v. Virginia, 388 U.S. 1, 11 (1967) ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies" state law that prohibited interracial marriages).

the Constitution as imposing a flat ban on affirmative action by state and local governments. 488 U.S. at 509-11.

Two members of the Adarand majority, Justices Scalia and Thomas, wrote separate concurring opinions in which they took a more stringent position. Consistent with his concurring opinion in Croson, Justice Scalia would have adopted a near-absolute constitutional bar to affirmative action. Taking issue with Justice O'Connor's proposition that racial classifications may be employed in certain circumstances to remedy discrimination against minorities, Justice Scalia stated that the "government can never have a 'compelling interest' in discriminating on the basis of race to 'make-up' for past racial discrimination in the opposite direction." 63 U.S.L.W. at 4534 (Scalia, J., concurring in part and concurring in the judgment).[6] According to Justice Scalia, "[i]ndividuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus on the individual . . . ." Id. The compensation of victims of specific instances of discrimination through "make-whole" relief, which Justice Scalia accepts as legitimate, is not affirmative action, as that term is generally understood. Affirmative action is a group-based remedy: where a group has been subject to discrimination, individual members of the group can benefit from the remedy, even if they have not proved that they have been discriminated against personally.[7] Justice O'Connor's treatment of affirmative action in Adarand is consistent with this understanding.

Although Justice Thomas joined the portion of Justice O'Connor's opinion holding that the government's interest in redressing the effects of discrimination can be sufficiently compelling to warrant the use of remedial racial and ethnic classifications, he apparently agrees with Justice Scalia's rejection of the group-based approach to remedying discrimination. Justice Thomas stated that the "government may not make distinctions on the basis of race," and that it is "irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help

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[6] In his Croson concurrence, Justice Scalia said that he believes that "there is only one circumstance in which the States may act by race to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification." 488 U.S. at 524 (Scalia, J., concurring in the judgment). For Justice Scalia, "[t]his distinction explains [the Supreme Court's] school desegregation cases, in which [it has] made plain that States and localities sometimes have an obligation to adopt race-conscious remedies. Id. The school desegregation cases are generally not thought of as affirmative action cases, however. Outside of that context, Justice Scalia indicated that he believes that "[a]t least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embodied in the Fourteenth Amendment that our Constitution is color-blind." Id. at 521.

[7] See Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 482 (1986); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277-78 (1986) (plurality opinion); id. at 287 (O'Connor, J., concurring).

those thought to be disadvantaged." Id. (Thomas, J., concurring in part and concurring in the judgment).

The four dissenting Justices in Adarand (Justices Stevens, Souter, Ginsburg, and Breyer)[8] would have reaffirmed the intermediate scrutiny standard of review for congressionally authorized affirmative action measures established in Metro Broadcasting, and would have sustained the DOT program on the basis of Fullilove, where the Court upheld federal legislation requiring grantees to use at least ten percent of certain grants for public works projects to procure goods and services from minority businesses. Justices Stevens and Souter argued that the DOT program was more narrowly tailored than the legislation upheld in Fullilove. 63 U.S.L.W. at 4539-41 (Stevens, J., dissenting); id. at 4542 (Souter. J., dissenting). All four dissenters stressed that there is a constitutional distinction between racial and ethnic classifications that are designed to aid minorities and classifications that discriminate against them. As Justice Stevens put it, there is a difference between a "No Trespassing" sign and a "welcome mat." Id. at 4535 (Stevens, J., dissenting). See id. ("an attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a [race-based] subsidy that enables a relatively small group of [minorities] to enter that market."); see also id. at 4543 (Souter, J., dissenting); id. at 4544 (Ginsburg, J., dissenting). For the dissenters, Justice O'Connor's declaration that strict scrutiny of affirmative action programs is not "fatal in fact" signified a "common understanding" among a majority of the Court that those differences do exist, and that affirmative action may be entirely proper in some cases. Id. at 4543 (Ginsburg, J., dissenting). In Justice Ginsburg's words, the "divisions" among the Justices in Adarand "should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects." Id. The dissenters also emphasized that there is a "significant difference between a decision by the Congress of the United States to adopt an affirmative-action program and such a decision by a State or a municipality." Id. at 4537 (Stevens, J., dissenting); id. at 4542 (Souter, J., dissenting). They stressed that unlike state and local governments, Congress enjoys express constitutional power to remedy discrimination against minorities; therefore, it has more latitude to engage in affirmative action than do state and local governments. Id. at 4538 (Stevens, J., dissenting). Justice Souter noted that the majority opinion did not necessarily imply a contrary view. Id. at 4542 (Souter, J., dissenting).

Thus, there were at most two votes in Adarand (Justices Scalia and Thomas) for anything that approaches a blanket prohibition on race-conscious affirmative action. Seven justices confirmed that federal affirmative action programs that use race or ethnicity as a decisional factor can be legally sustained under certain circumstances.

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[8] Justice Stevens wrote a dissenting opinion that was joined by Justice Ginsburg. Justice Souter wrote a dissenting opinion that was joined by Justices Ginsburg and Breyer. And Justice Ginsburg wrote a dissenting opinion that was joined by Justice Breyer.

C. Scope of Adarand

Although Adarand involved government contracting, it is clear from the Supreme Court's decision that the strict scrutiny standard of review applies whenever the federal government voluntarily adopts a racial or ethnic classification as a basis for decisionmaking.[9] Thus, the impact of the decision is not confined to contracting, but will reach race-based affirmative action in health and education programs, and in federal employment.[10] Furthermore, Adarand was not a "quota" case: its standards will apply to any classification that makes race or ethnicity a basis for decisionmaking.[11] Mere outreach and recruitment efforts, however, typically should not be subject to the Adarand standards. Indeed, post-Croson cases indicate that such efforts are considered race-neutral means of increasing minority opportunity.[12] In some sense, of course, the targeting of minorities through outreach and recruitment campaigns involves race-conscious action. But the objective there is to expand the pool of applicants or bidders to include minorities, not to use race or ethnicity in the actual decision. If the government does not use racial or ethnic classifications in selecting persons from the expanded pool, Adarand ordinarily would be inapplicable.[13]

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[9] By voluntary affirmative action, we mean racial or ethnic classifications that the federal government adopts on its own initiative, through legislation, regulations, or internal agency procedures. This should be contrasted with affirmative action that is undertaken pursuant to a court-ordered remedial directive in a race discrimination lawsuit against the government, or pursuant to a court-approved consent decree settling such a suit. Prior to Croson, the Supreme Court had not definitely resolved the standard of review for court-ordered or court-approved affirmative action. See United States v. Paradise, 480 U.S. 149 (1987) (court order); Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (consent decree). The Court has not revisited the issue since Croson was decided. Lower courts have applied strict scrutiny to affirmative action measures in consent decrees. See, e.g., Stuart v. Roache, 951 F.2d 446, 449 (1st Cir. 1991) (Breyer, J.).

[10] Title VII of the 1964 Civil Rights Act is the principal federal employment discrimination statute. The federal government is subject to its strictures. See 42 U.S.C. § 2000e-17. The Supreme Court has held that the Title VII restrictions on affirmative action in the workplace are somewhat more lenient than the constitutional limitations. See Johnson v. Transportation Agency, 480 U.S. 616, 627-28 n.6 (1987). But see id. at 649 (O'Connor, J., concurring in the judgment) (expressing view that Title VII standards for affirmative action should be "no different" from constitutional standards).

[11] We do not believe that Adarand calls into question federal assistance to historically-black colleges and universities.

[12] See, e.g., Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1557-58 (11th Cir. 1994); Billish v. City of Chicago, 962 F.2d 1269, 1290 (7th Cir. 1992), vacated on other grounds, 989 F.2d 890 (7th Cir.) (en banc), cert. denied, 114 S. Ct. 290 (1993); Coral Constr. Co. v. King County, 941 F.2d 910, 923 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992).

[13] Outreach and recruitment efforts conceivably could be viewed as race-based decisionmaking of the type subject to Adarand if such efforts work to create a "minorities-only" pool of applicants or bidders, or if they are so focused on minorities that nonminorities are placed at a significant competitive disadvantage

Adarand does not require strict scrutiny review for programs benefitting Native Americans as members of federally recognized Indian tribes. In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court applied rational basis review to a hiring preference in the Bureau of Indian Affairs for members of federally recognized Indian tribes. The Court reasoned that a tribal classification is "political rather than racial in nature," because it is "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." Id. at 554. See id. at 553 n.24.

Adarand did not address the appropriate constitutional standard of review for affirmative action programs that use gender classifications as a basis for decisionmaking. Indeed, the Supreme Court has never resolved the matter.[14] However, both before and after Croson, nearly all circuit court decisions have applied intermediate scrutiny to affirmative action measures that benefit women.[15] The Sixth Circuit is the only court that has equated racial and gender classifications: purporting to rely on Croson, it held that gender-based affirmative action measures are subject to strict scrutiny.[16] That holding has been criticized by other courts of appeals, which have correctly pointed out that Croson does not speak to the appropriate standard of review for such measures.[17]

D. Open Questions on Remand

Adarand did not determine the constitutionality of any particular federal affirmative action program. In fact, the Supreme Court did not determine the validity of the federal legislation, regulations, or program at issue in Adarand itself. Instead, the Court remanded the case to the Tenth Circuit for a determination of whether the measures satisfy strict scrutiny.

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with respect to access to contracts, grants, or jobs.

[14] The lone gender-based affirmative action case that the Supreme Court has decided is Johnson v. Transportation Agency, 480 U.S. 616 (1987). But Johnson only involved a Title VII challenge to the use of gender classifications -- no constitutional claim was brought. Id. at 620 n.2. And as indicated above (see supra note 10), the Court in Johnson held that the Title VII parameters of affirmative action are not coextensive with those of the Constitution.

[15] See, e.g., Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1579-80 (11th Cir. 1994); Contractors Ass'n v. City of Philadelphia, 6 F.3d 990, 1009-10 (3d Cir. 1993); Lamprecht v. FCC, 958 F.2d 382, 391 (D.C. Cir. 1992) (Thomas, J.); Coral Constr. Co. v. King County, 941 F.2d at 930-31; Associated Gen. Contractors v. City and County of San Francisco, 813 F.2d 922, 939 (9th Cir. 1987).

[16] See Conlin v. Blanchard, 890 F.2d 811, 816 (6th Cir. 1989); see also Brunet v. City of Columbus, 1 F.3d 390, 404 (6th Cir. 1993), cert. denied, 114 S. Ct. 1190 (1994).

[17] See, e.g., Ensley Branch, NAACP v. Seibels, 31 F.3d at 1580.

Adarand left open the possibility that, even under strict scrutiny, programs statutorily prescribed by Congress may be entitled to greater deference than programs adopted by state and local governments. This is a theme that some of the Justices had explored in prior cases. For example, in a portion of her Croson opinion joined by Chief Justice Rehnquist and Justice White, Justice O'Connor wrote that Congress may have more latitude than state and local governments in utilizing affirmative action. And in his concurrence in Fullilove, Justice Powell, applying strict scrutiny, upheld a congressionally mandated program, and in so doing, said that he was mindful that Congress possesses broad powers to remedy discrimination nationwide. In any event, in Adarand, the Court said that it did not have to resolve whether and to what extent courts should pay special deference to Congress in evaluating federal affirmative action programs under strict scrutiny.

Aside from articulating the components of the strict scrutiny standard, the Court's decision in Adarand provides little explanation of how the standard should be applied. For more guidance, one needs to look to Croson and lower court decisions applying it. That exercise is important because Adarand basically extends the Croson rules of affirmative action to the federal level -- with the caveat that application of those rules might be somewhat less stringent where affirmative action is undertaken pursuant to congressional mandate.

II. The Croson Standards

In Croson, the Supreme Court considered a constitutional challenge to a Richmond, Virginia ordinance that required prime contractors who received city contracts to subcontract at least thirty percent of the dollar amount of those contracts to businesses owned and controlled by members of specified racial and ethnic minority groups -- commonly known as minority business enterprises ("MBEs"). The asserted purpose of Richmond's ordinance was to remedy discrimination against minorities in the local construction industry.

Croson marked the first time that a majority of the Supreme Court held that race-based affirmative action measures are subject to strict scrutiny.[18] Justice O'Connor's opinion in Croson[19] said that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this

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[18] Croson was decided by a six-three vote. Five of the Justices in the majority (Chief Justice Rehnquist, and Justices White, O'Connor, Scalia, and Kennedy) concluded that strict scrutiny was the applicable standard of review. Justice Stevens concurred in part and concurred in the judgment, but consistent with his long-standing views, declined to "engag[e] in a debate over the proper standard of review to apply in affirmative-action litigation." 488 U.S. at 514 (Stevens, concurring in part and concurring in the judgment).

[19] Justice O'Connor's opinion was for a majority of the Court in some parts, and for a plurality in others.

compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." 488 U.S. at 493 (plurality opinion). See also id. at 520 (Scalia, J., concurring in the judgment) ("[S]trict scrutiny must be applied to all governmental classifications by race, whether or not its asserted purpose is 'remedial' or 'benign.'"). In short, the compelling interest inquiry centers on "ends" and asks why the government is classifying individuals on the basis of race or ethnicity; the narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the racial or ethnic classification.

Applying strict scrutiny, the Court held that (a) the Richmond MBE program did not serve a "compelling interest" because it was predicated on insufficient evidence of discrimination in the local construction industry, and (b) it was not "narrowly tailored" to the achievement of the city's remedial objective.

A. Compelling Governmental Interest

1. Remedial Objectives

Justice O'Connor's opinion in Croson stated that remedying the identified effects of past discrimination may constitute a compelling interest that can support the use by a governmental institution of a racial or ethnic classification. This discrimination could fall into two categories. First, the government can seek to remedy the effects of its own discrimination. Second, the government can seek to remedy the effects of discrimination committed by private actors within its jurisdiction, where the government becomes a "passive participant" in that conduct, and thus helps to perpetuate a system of exclusion. 488 U.S. at 492 (plurality opinion); id. at 519 (Kennedy, J., concurring in part and concurring in the judgment). In either category, the remedy may be aimed at ongoing patterns and practices of exclusion, or at the lingering effects of prior discriminatory conduct that has ceased. See Adarand, 63 U.S.L.W. at 4542 (Souter, J., dissenting) ("The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination.").

Croson requires the government to identify with precision the discrimination to be remedied. The fact and legacy of general, historical societal discrimination is an insufficient predicate for affirmative action: "While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia." 488 U.S. at 499. See id. at 505 ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group."). Similarly, "amorphous" claims of discrimination in certain sectors and industries are inadequate. Id. at 499 ("[A]n amorphous claim that there

has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."). Such claims "provide[] no guidance for [the government] to determine the precise scope of the injury it seeks to remedy, and would have "no logical stopping point." Id. at 498 (internal quotations omitted). The Court indicated that its requirement that the government identify with specificity the effects of past discrimination anchors remedial affirmative action measures in the present. It declared that "[i]n the absence of particularized findings" of discrimination, racial and ethnic classifications could be "ageless in their reach into the past, and timeless in their ability to affect the future." Id. at 498. (internal quotations omitted).

The Court in Croson did not require a judicial determination of discrimination in order for a state or local government to adopt remedial racial or ethnic classifications. Rather, relying on Justice Powell's plurality opinion in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), the Court said that the government must have a "'strong basis in evidence for its conclusion that remedial action was necessary.'" Croson, 488 U.S. at 500 (quoting Wygant, 476 U.S. at 277). The Court then suggested that this evidence should approach "a prima facie case of a constitutional or statutory violation" of the rights of minorities. 488 U.S. at 500.[20] Notably, the Court said that significant statistical disparities between the level of minority participation in a particular field and the percentage of qualified minorities in the applicable pool could permit an inference of discrimination that would support the use of racial and ethnic classifications intended to correct those disparities. Id. at 507. See id. at 501 ("There is no doubt that where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.") (internal quotations omitted). But the Court said that a mere underrepresentation of minorities in a particular sector or industry when compared to general population statistics is an insufficient predicate for affirmative action. Id. ("When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who may possess the necessary qualifications) may have little probative value.") (internal quotations omitted).

Applying its "strong basis in evidence" test, the Court held that the statistics on which Richmond based its MBE program were not probative of discrimination in contracting by the city or local contractors, but at best reflected evidence of general societal discrimination. Richmond had relied on limited testimonial evidence of discrimination, supplemented by

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[20] Lower courts have consistently said that Croson requires remedial affirmative action measures to be supported by a "strong basis in evidence" that such action is warranted. See, e.g., Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1553 (11th Cir. 1994); Concrete Works v. City and County of Denver, 36 F.3d 1513, 1521 (10th Cir. 1994), cert. denied, 115 S. Ct. 1315 (1995); Donaghy v. City of Omaha, 933 F.2d 1448, 1458 (8th Cir.), cert. denied, 502 U.S. 1059 (1991). Some courts have said that this evidence should rise to the level of prima facie case of discrimination against minorities. See, e.g., O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 424 (D.C. Cir. 1992); Stuart v. Roache, 951 F.2d 446, 450 (1st Cir. 1991) (Breyer, J.); Cone Corp. v. Hillsborough County, 908 F.2d 908, 915 (11th Cir.), cert. denied, 498 U.S. 983 (1990).